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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden,, *Petitioner*,

v.

ROBERT CRUZ MCLAIN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a twice-convicted felon have an Eighth Amendment right at the sentencing phase of his capital trial to have his jury fully informed of the extant legal regime under which a sentence of life imprisonment with the possibility of parole through commutation is subject to the limitation that any commutation for a twice-convicted felon also requires the concurrence of four of the seven justices of the state supreme court?

2. Does a capital defendant have a Fourteenth Amendment Due Process right to have his sentencing jury consider limitations on the possibility of his release on parole through commutation when the prosecution does not argue future dangerousness?

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Arthur Calderon, Warden of California State Prison at San Quentin (the warden), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court's judgment granting a partial writ of habeas corpus, is reported as McLain v. Calderon, 134 F.3d 1383 (9th Cir. 1998), and is reprinted in Appendix A of this Petition. The district court judgment and memorandum opinion conditionally granting and denying in part the petition for writ of habeas corpus are unpublished and reprinted in Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals' judgment issued on January 26, 1998. The Court of Appeals' order denying the warden's timely filed petition for rehearing and suggestion for rehearing en banc issued on March 24, 1998. This Petition for Writ of Certiorari follows within 90 days. 28 U.S.C. § 2101(c): Sup. Ct. R. 13.1, 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Eighth Amendment of the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the Constitution, Section 1, provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Section 2254 of title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Crimes

On August 9, 1979, the California Department of Corrections granted Robert Cruz McLain his release from state prison and placed him on parole. This prison term, the second of two McLain had served dating back to 1962, stemmed from seven felony sexual offenses McLain committed in 1971 in Ventura, California, against three 11 and 12-year-old girls, Jodi W., Lisa D., and Sherrie Y. Eight years before his release, McLain had threatened Jodi W. and Lisa D. with a promise to kill them if they told anyone what he had done to them.

Prior to his release, McLain told the parole board he was going to get revenge against Jodi W. and others by shooting them. Three months after his release, McLain returned to Ventura to rape again and murder Jodi W. He used two teenagers, one of them his nephew, to trick Jodi W's mother into revealing where Jodi W. now lived. McLain's planned murder and rape of Jodi W. failed, however, after he and his nephew could not break into Jodi W's apartment.

That same day, McLain and the two teenagers picked up in McLain's car a hitchhiker named Joni Kelley. One teenager sensed something was going to happen to Joni Kelley and got out of the car. Within hours, McLain and his nephew raped, beat, and

murdered Joni Kelley. She died from three gunshots fired into her face. A few days later, McLain robbed and murdered Diana Bazargani in Solano County, California. She was strangled, had her throat slit, and was stabbed to death.

The State Trial

A Ventura County Superior Court jury convicted McLain of nine felony charges. These convictions were the attempted murder of Jodi W., the conspiracy to commit rape and the attempted rape of Jodi W., the conspiracy to commit burglary and the attempted burglary of the Jodi W.'s apartment, the conspiracy to commit rape and the rape of Joni Kelley, and the conspiracy to commit murder and the murder of Joni Kelley. Among the special allegations found true were the special circumstance allegations that McLain had committed the murder of Joni Kelley in the course of rape, and further, that McLain had previously been convicted of first degree murder.

Not including the 1979 crimes in Ventura and Solano, at the time McLain's penalty phase began, he had already served two prior prison terms and, as the jury would learn during the penalty phase, had been previously convicted of 11 felonies, 10 of which involved violence, and 8 of which were sex crimes.

A. The "Morse" Instruction

Just before the start of McLain's penalty trial, the prosecutor raised an objection to the admission of any evidence of or any reference to the fact that a previous penalty jury in McLain's Solano County case had imposed a sentence upon him of life without the possibility of parole. In the prosecutor's view, such evidence was not relevant and its only purpose was to prejudice the jury into imposing a life without parole sentence simply because an earlier jury had done so.

Defense counsel countered that the earlier sentence was relevant under state law that allowed the jury to consider any

factor extenuating the crime. He further argued that the subject was relevant in response to the prosecutor's stated intention to argue that McLain might be paroled because of the possibility of commutation by the Governor of a life without parole sentence, since McLain would be serving two life without parole sentences. The prosecutor then conceded that the fact that McLain was then serving a life without parole sentence was relevant, but the fact that the Solano penalty jury had chosen such a sentence over a death sentence was not.

The trial judge was of the opinion that the California Supreme Court's decision in People v. Morse, 388 P.2d 33 (1964), was controlling on this issue. The trial judge stated:

> [Under] Morse, it would seem to indicate, the jury is not to be left totally in the dark in this kind of situation and that it would be proper under Morse for the jury to be told that there may be parole but that is not in any way to affect their consideration.

The prosecution and defense then agreed upon a stipulation that advised the jury, among other things, that McLain had been convicted in the Superior Court of Solano County of committing robbery and the first degree murder of Diana Bazargani, and that McLain had been sentenced to life in prison without the possibility of parole.

The trial judge ruled that it was required by statute to advise the jury of the Governor's commutation power over a sentence of life without the possibility of parole, but that, pursuant to Morse, the court could not allow evidence of the Governor's commutation practices or parole practices to be considered by the jury. The trial judge stated that "this trial should not result in a trial of the Governor's office or a trial of the Board of Prison Terms." The trial judge further explained his ruling on the grounds articulated in Morse that

> [j]urors are often wondering about things like that, regardless of the presence or lack of evidence on the subject and perhaps the Morse instruction lays that wondering and that speculation to rest.

In response to this ruling, defense counsel made an offer of proof that, as of that date, the Governor's office had no set policy, had made no determination as to how it would proceed, had not considered the question, and had not set up any standards on the commutation of a sentence. Defense counsel did not make an offer of proof that the Governor's commutation power was limited in the case of an applicant with two or more prior felony convictions to require the recommendation of four justices of the California Supreme Court.

The trial judge then took up the question of the relevancy of the prosecution's proposed penalty phase evidence that McLain had stated to a sheriff's deputy named David Williams that if he were to commit suicide he wanted to take a law enforcement officer with him before doing so, and further, that McLain had written a letter to his niece, Mary Rich, that stated the next time he was released from prison he would "not try to do right." The court ruled that such evidence

> would not be proper to receive it [sic] on the question of future conduct in light of the position in light of the position that the Court has taken with respect to the Morse instruction.
>
> This jury is to be instructed that commutation or the possibility of parole is not in any way to affect their decision. It would seem, however, relevant on the matter of the defendant's character, to some extent, his background and his mental condition and it would in my view, if I were to receive this, be appropriate to permit it being received -- it would be appropriate to instruct the jury both at the time of its receipt and at the time the jury is finally instructed as to its limited purpose.

The future dangerousness instruction that was later put in writing and received by the jury stated:

> Evidence has been received of statements attributed to the defendant which may reflect upon his attitude or intent to commit crimes in the future. Such evidence, if believed by you, may be considered only for the limited

issue of the defendant's character, mental state and condition, if you determine that it bears thereon.

Specifically, you are not permitted to consider such evidence in determining whether to impose the death penalty on the theory that the defendant may commit future crimes or that it suggests the defendant's propensity to commit future crimes, as that is not a proper subject for your consideration.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as all other evidence in the case.

The commutation instruction that was later put in writing and received by the jury stated:

You are instructed that under the [California] state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.

You are further instructed, that such power by a governor to commute or modify a sentence is not to be considered by you in determining whether the defendant should be sentenced death or life imprisonment without the possibility of parole. You may not speculate as to if, or when, a commutation or modification would or would not be granted to the defendant. It is not your function to decide now whether the defendant will receive such a commutation or modification at some future date. So far as you are concerned, you are to decide only whether the defendant shall suffer the death penalty or shall be permitted to remain alive under a sentence of life imprisonment without the possibility of parole. If upon consideration of the evidence and the instructions, you conclude that life imprisonment without the possibility of parole is the proper sentence, you must assume that the governor will perform his duty in a correct and

responsible manner and will not commute this defendant's sentence unless convinced that he should be eligible for parole and can be safely released into society in a correct and responsible manner. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor will properly carry out his responsibilities.

B. The Preinstruction

The penalty phase in this case began with the trial court preinstructing the jury as to the sentencing factors applicable under California law, including "any . . . circumstance which extenuates or mitigates the gravity of the crime even though it is not a legal excuse for the crime" and "the defendant's character, background, history, mental condition and physical condition." (34 RT at 8255:1-8256:9.)

C. The Prosecution's Opening Statement Re McLain's Statements Predicting His Own Future Criminality

The prosecution's opening statement made reference to three of the four statements made by McLain predicting his own future criminality. The prosecutor told the jury that he intended to present evidence that McLain had told a sheriff's deputy that eight days after McLain had escaped from the Ventura County Jail that he wanted to escape again, and the next time he escaped, it would "not be non-violent." The prosecutor also told the jury that he intended to present evidence that McLain had told another sheriff's deputy in response to a challenge to just commit suicide if his life was so miserable that he wanted to "take one of you guys with me before I do that." Finally, the prosecutor told the jury that he intended to present evidence that McLain had written a letter to his neice that stated that "the next time I get out, I will not try to do right."

D. The Prosecution's Penalty Phase Evidence Re McLain's Statements Predicting His Own Future Criminality

At the penalty trial, the prosecutor did put on evidence of all three of these predictions made by McLain. Immediately before the third statement was admitted into evidence, the trial court read to the jury the limiting instruction that would later be given to the jury stating:

> People's 10 is received. It is received with the following admonition of the court: Ladies and gentlemen, evidence has been received of statements attributed to the defendant which may reflect upon his attitude or intent to commit crimes in the future.
>
> Such evidence, if believed by you, may be considered only for the limited issue of the defendant's character, mental state and condition, if you determine that it bears thereon.
>
> Specifically, you are not permitted to consider such evidence in determining whether to impose the death penalty on the theory that the defendant may commit future crimes or that it suggests the defendant's propensity to commit future crimes as that is not a proper subject for your consideration.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as all other evidence in the case.

E. The Prosecution's Penalty Phase Closing Argument Re McLain's Statements Predicting His Own Future Criminality And Their Relation To McLain's Character

During the prosecutor's closing argument, the prosecutor never argued to the jury that any of the three predictions from McLain were aggravating evidence of McLain's future criminal conduct. The prosecutor never stated that McLain would commit any future crimes. He also never argued that the jury could impose a death sentence on the basis of any future crimes McLain might commit.

Instead, the prosecutor made a detailed argument that emphasized the enormity and the moral qualitative judgment required of the jury pursuant to specific sentencing factors. Before discussing any of McLain's three predictions of future criminality, the prosecutor admonished the jury not to consider McLain's statements as proof of what he might do in the future, but only to consider them as proof of McLain's bad character. The prosecutor also referred to the jury's sentencing alternatives as death and life without the possibility of parole. He never mentioned the possibility of any parole, commutation, or pardon by the Governor.

At one point in the argument, the prosecutor focused the jury's attention on McLain's three different statements suggesting his intent to commit future crimes. After recounting the vivid details of McLain's prior crimes, the prosecutor rhetorically asked the jury:

> Now, has the defendant at any time learned anything that you would like him to learn from all this? Is he really sorry for what he he's done in the past? Because, although you are not to base your decision on a prediction of what he would do in the future, I think certainly a factor is his character and mental state and what is his mental state? Well, I think he laid it out pretty well in the letter to Mary Rich.
>
> He said, "I tried to do good while I was out there," although how you square that with his conduct is beyond belief. But then he said, "But the next time I get out, I will not try to do right." He doesn't have the slightest remorse or conscience for anything he's done, and his statement on what he would like to do is that he'd like to do worse -- he would like to do more than what he did the last time. That's his feeling.
>
> Maybe he did take care of his mother once; but whether or not he did or how much of that he really did of that, it is obvious that however many problems and character flaws he had years ago, he's done nothing but get worse. He certainly hasn't improved with age.

Later, in the course of discussing specific factors enumerated by statute, the prosecutor summed up and argued that McLain's age, was an aggravating factor in the case. As he explained:

> You know, I think it's fair to assume that the reason that factor is in there and what is meant by that is that other things being equal, the younger the person, the more extenuating the crime. . . . The older he is and the more he's done and the more chances he's had and the more he's shown a disinclination to reform or change, the more the age factor counts against him.
>
> And we are dealing here with a guy who is 41, who's had lots of chances, who's had lots of opportunities, and whose attitude is, as he expressed in the letter, the next time out, if he would have had a next time out, he's not going to try to do right.
>
> So that factor is certainly a minus for him.

F. Defense Closing Argument Re Jury's Sentencing Alternative As Life Imprisonment Without The Possibility Of Parole And McLain's Ability To Conform His Conduct In Prison For The Remainder Of His Natural Life

During closing argument, defense counsel referred to the jury's sentencing alternative as life imprisonment without the possibility of parole. One of the defense themes during this argument conceded that McLain could not function properly outside of prison, but argued that McLain, because of his impoverished and harsh childhood, never had a chance to develop properly, and had proven he could adapt to and behave quite well in prison before, and could do so again, if given the chance to live for the rest of his natural life in prison. This presentation focused, among other things, on prison records that provided the jury with numerous and detailed accounts of McLain's past good behavior in prison.

G. The Instructions

Immediately after the defense finished its final summation, the trial court began instructing the jury. In so doing the trial court specifically instructed the jury that it could not predicate its penalty on the theory that McLain would or had the propensity to commit crimes in the future:

> Evidence has been received of statements attributed to the defendant which may reflect upon his attitude or intent to commit crimes in the future. Such evidence, if believed by you, may be considered only for the limited issue of the defendant's character, mental state and condition if you determine that it bears thereon.
>
> Specifically, you are not permitted to consider such evidence in determining whether to impose the death penalty on the theory that the defendant may commit future crimes or that it suggests the defendant's propensity to commit future crimes, as that is not a proper subject for your consideration.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as all other evidence in the case. Evidence of any crime for which the defendant was not tried and is alleged to have been committed by the defendant may not be considered in aggravation unless proved beyond a reasonable doubt.

The jury then retired to its deliberations. The jury returned a death verdict.

The State Appeal

McLain appealed the judgment to the California Supreme Court. On appeal, McLain argued that the modified commutation instruction violated the California Supreme Court's decision in People v. Ramos, 689 P.2d 430 (1984). In that case, the California Supreme Court held, as a matter of California law, that the subject of commutation, pardon, or parole was a constitutionally irrelevant

sentencing factor in a death penalty case, and further, any commutation instruction that failed to reference the Governor's ability to commute a death sentence in addition to the ability to commute a sentence of life imprisonment constituted a denial of state due process because its incompleteness erroneously suggested that a death sentence could not be commuted.

On appeal, the State argued that the cautionary supplement cured and rendered harmless the error under Ramos. The California Supreme Court found that the supplemental no-inference instruction did nothing to cure the original misimpression that a death sentence could not be commuted, but that the supplemental charge directing the jury "to make no use of the Briggs Instruction in choosing the penalty" rendered the original errors non-prejudicial. People v. McLain, 757 P.2d 569, 582 (1988).

In so doing, the Court rejected the claim that "the supplementary charge was itself confusing and misleading" by "understanding [the charge] as would a reasonable juror, we believe that the charge clearly and correctly directed the jurors attention away from the [impermissible state law] considerations raised by the Briggs Instruction and back to the proper conduct of their task." Id. at 582 n.5.

This Court denied McLain certiorari review of the California Supreme Court's opinion. McLain v. California, 489 U.S. 1072 (1989).

The Federal District Court Proceedings

On May 15, 1989, McLain sought a stay of execution and appointment of counsel in federal district court in the Central District of California. On December 28, 1989, McLain filed a petition for writ of habeas corpus in the district court. During the pendency of the district court proceedings, on February 3, 1994, the United States Court of Appeals for the Ninth Circuit decided the case of Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994), cert. denied, 512 U.S. 1220 (1994).

In California v. Ramos, 463 U.S. 992 (1983), this Court upheld against an Eighth and Fourteenth Amendment challenge a penalty phase jury instruction that informed the jury that the Governor possessed the power to commute a prison sentence of life without the possibility of parole to a sentence of life with the possibility of parole. In Hamilton, a two-judge majority sustained an Eighth and Fourteenth Amendment challenge to this commutation instruction when it was supplemented by a lengthy "no-inference" instruction and further commutation and length of sentence information.

The new commutation information in Hamilton was the legal requirement of a second tier for commutation of sentences for twice-convicted felons, like Hamilton, that required the written recommendation of at least four justices of the California Supreme Court. The new length of sentence information was the legal requirement that a life sentence required imprisonment for at least 25 years, less one-third off for good time credits, before parole could be considered by the authorities. Hamilton v. Vasquez, 17 F.3d at 1161-62.

Here, as in Hamilton, McLain was a twice-convicted felon and the supplemental no-inference instruction was given. Unlike Hamilton, the no-inference supplement did not reference parole officials, the tiered commutation procedure involving the California Supreme Court used for twice-convicted felons, or the possible length of a life sentence.

On August 21, 1995, the district court granted McLain's third-amended petition for writ of habeas corpus. The district court denied petitioner relief under the Hamilton claim, among others, but granted petitioner relief under a claim brought pursuant to Skipper v. South Carolina, 476 U.S. 1 (1986). The district court rejected the warden's assertion that the Hamilton claim was barred under the Teague doctrine. However, the court distinguished Hamilton on the ground that Hamilton's principal concern focused on the erroneous suggestion, not present in McLain's case, that a sentence of life without the possibility of parole was effectively only a prison sentence of 16 years and 8 months.

The judgment granting and denying, in part, the petition for writ of habeas corpus was entered on August 24, 1995. The warden timely filed on September 8, 1995 a motion for reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The district court denied the motion and entered its order on December 29, 1995. The warden timely filed an amended notice of appeal January 9, 1996. McLain filed an untimely notice of cross-appeal on February 6, 1996.

The United States Court Of Appeals Proceedings

On January 26, 1998, the Ninth Circuit affirmed the district court's partial grant of the writ. McLain v. Calderon, 134 F.3d 1383 (9th Cir. 1998). However, two of the three judge majority did so on the basis of the Hamilton claim without addressing the Skipper claim. The court found McLain's case "materially indistinguishable from Hamilton." Id. at 1385. On February 9, 1998, the warden timely filed a petition for rehearing and suggestion for rehearing en banc. The warden sought rehearing on the basis of the non-retroactivity rule of Teague v. Lane, 489 U.S. 288 (1989) and sought rehearing en banc on the underlying merits of the Hamilton rule. The petition for rehearing was denied and the suggestion for rehearing en banc was rejected by the Ninth Circuit on March 24, 1998.

REASONS WHY THE WRIT SHOULD BE GRANTED

Certiorari review should be granted because the Ninth Circuit has, as stated in Rule 10(c) of the Rules of the Supreme Court, decided an important question of law that has not been, but should be, decided by this Court.

First, the Ninth Circuit has held that a capital defendant who is a twice-convicted felon has an Eighth Amendment right to have the sentencing jury accurately advised by the trial court that the Governor's power to commute a life sentence without parole requires the concurrence of four of the seven justices of the state

supreme court for twice-convicted felons. Second, the Ninth Circuit has decided that a state capital defendant has a right to inform the sentencing jury of limitations on the possibility of having his life without parole sentence commuted even where the trial judge has removed the issue of future dangerousness entirely from the jury's consideration.

ARGUMENT

I.

THE WRIT SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE FOR THE FIRST TIME WHETHER A DEFENDANT HAS AN EIGHTH AMENDMENT RIGHT TO HAVE HIS SENTENCING JURY INFORMED, BECAUSE OF A NEED FOR ACCURATE SENTENCING INFORMATION, THAT UNDER STATE LAW THE GOVERNOR'S POWER TO COMMUTE A SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE REQUIRES IN THE CASE OF TWICE-CONVICTED FELONS THE RECOMMENDATION OF FOUR JUSTICES OF THE STATE'S HIGHEST COURT

Many times before, this Court has stated that the States have the sovereign freedom to provide capital defendants greater protection under the applicable State constitutions than is provided under the United States Constitution. California has done so in this case and the effort has backfired. Here, even though the prosecution could not and did not argue McLain's future dangerousness and possible release back into society, the Ninth Circuit held that McLain's Eighth Amendment right to accurate sentencing information provided to his capital jury was violated when the jury was not advised of information that might have suggested a lesser likelihood of McLain's possible release back into society if he were sentenced to life imprisonment without the possibility of parole.

Because McLain was a twice-convicted felon, the Governor would have the power to commute a sentence of life imprisonment without the possibility of parole only after four justices of the California Supreme Court recommended commutation. The absence of this additional information, the Ninth Circuit found, violated the defendant's Eighth Amendment

right to accurate sentencing information. This rule, the Ninth Circuit held, is a "necessary corollary" of this Court's decision in California v. Ramos, 463 U.S. 992 (1983). Hamilton v. Vasquez, 17 F.3d at 1160.

Certiorari should be granted in this case to decide whether this is a correct interpretation of this Court's Eighth Amendment jurisprudence. The Court has once before granted certiorari on this question in Simmons v. South Carolina, 512 U.S. 154 (1994) and two Justices of this Court have already concluded that there is such a right under the Eighth Amendment. In Simmons, Justices Souter and Stevens agreed that the defendant in that case should have been granted his request to advise the jury of his ineligibility for parole even if future dangerousness was not an issue in his case because the defendant had an Eighth Amendment right to "accurate sentencing information" and "to require instructions on the meaning of legal terms used to describe the sentences." Id. at 172-74.

It is true, as the Ninth Circuit observed, that this Court, in rejecting an Eighth Amendment challenge to the basic commutation instruction, found the unmodified commutation instruction to be accurate. California v. Ramos, 463 U.S. at 1009. However, that is not to say that the Eighth Amendment grants capital defendants immunity from inaccurate sentencing information. This Court rejected that proposition in Barefoot v. Estelle, 463 U.S. 880 (1983).

In Barefoot, this Court rejected the proposition that the entire category of expert testimony predicting future dangerousness should be excluded from capital sentencing trials because it was inaccurate more often than not. This Court found that there were adequate safeguards in our adversary system that allowed such testimony to be identified "not only as erroneous in a particular case but also as generally unreliable that it should be ignored." 463 U.S. at 898. Justice Blackmun dissented based on an Eighth Amendment need for "'accurate sentencing information.'" Barefoot v. Estelle, 463 U.S. at 928 (Blackmun, J., dissenting).

Both this dissent in Barefoot and Justice Souter's concurring opinion in Simmons rely on the three-justice opinion in

Gregg v. Georgia, 428 U.S. 153, 190 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.), as support for the need for accurate sentencing information. However, this opinion in Gregg only suggests that a far-ranging array of evidence concerning the defendant and the circumstances of the offense at the sentencing phase of a capital trial is important to foster an informed profile of the defendant for a jury. This is not to say that accuracy for its own sake is a substantive Eighth Amendment principle.

At the selection stage of a capital trial, the only substantive elements that the States must allow into the sentencing inquiry involve the "character and record of the individual offender and the circumstances of the particular offense." McCleskey v. Kemp, 481 U.S. 279, 302 (1987). This Court has not granted constitutional status to other factors not grounded in the defendant's character and the circumstances of his offense. Thus, capital defendants have no Eighth Amendment right to have a jury consider sympathy for its own sake as a basis for not imposing the death penalty. California v. Brown, 479 U.S. 538 (1987). In the same vein, capital defendants have no Eighth Amendment right to have a jury consider the prosecution's failure to prove the defendant's guilt beyond all doubt as a basis for not imposing the death penalty. Franklin v. Lynaugh, 487 U.S. 164, 172-76 (1988).

It follows from this that a capital defendant may not have an Eighth Amendment right to have a jury fully informed as to scope of a Governor's commutation powers. The missing information itself is evidence of neither the defendant's character and background nor the circumstances of his crime. It is not mitigating evidence. It is simply additional information concerning the extant legal regime.

Just last term, this Court held that its decision in Simmons v. South Carolina, constituted a new rule of constitutional law in violation of the non-retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989). O'Dell v. Netherland, __ U.S. __, 117 S. Ct. 1969 (1997). The defining characteristic that made Simmons a new rule of law was that Simmons, for the first time, required a jury to consider the question of future dangerousness with rebuttal evidence of the extant legal regime. No prior decision of this

Court had required the issue to go to the jury in the form of evidence of post-conviction events. Skipper v. South Carolina, 476 U.S. 1 (1986), this Court held, instead required the jury to consider the issue only through the admission of non-opinion lay testimony of the defendant's past conduct in jail. O'Dell, 117 S. Ct. at 1976-78.

If, as O'Dell indicates, Skipper may reasonably be interpreted as only a case involving the exclusion of historical evidence of the defendant's character and offense, it is undeniably an open and important question calling for this Court's resolution whether a State runs afoul of the Eighth Amendment when it fails to provide a jury with non-rebuttal evidence of the extant legal regime. If no historical evidence of the defendant's character and offense is kept from the jury, then there is no omission of constitutionally relevant evidence under the Eighth Amendment.

Only once before has this Court held that a capital defendant has an Eighth Amendment right to have his sentencing jury receive accurate sentencing information concerning post-conviction events. In Caldwell v. Mississippi, 472 U.S. 320 (1985), this Court found an Eighth Amendment violation when the prosecutor misled the jury as to the scope of appellate review of the defendant's sentence by unambiguously arguing that the sentence would be reviewed de novo.

However, the inaccurate statement of the nature of appellate review, was not in and of itself, the basis of the decision. It was the fact that the inaccuracy diminished the jury's sense of responsibility that formed the basis of the decision. Id. at 341 (plurality opinion), 341 (O'Connor, J., concurring).

This Court "has since read Caldwell as 'relevant only to certain types of comment -- those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for its sentencing decision.'" Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Caldwell therefore is a two-part test. "[T]he evidence must be *both* inaccurate *and* tend to undermine the jury's sense of responsibility." Id. at 15, (emphasis original) (O' Connor, J., concurring).

Here, the failure to advise McLain's jury of additional post-sentencing contingencies associated with the procedures he would have to go through to get a sentence of life imprisonment without the possibility of parole commuted did not diminish the jury's sense of responsibility. Nor did the cautionary supplement inaccurately state the jury's sentencing responsibilities. To the contrary, it correctly emphasized that, in any event, it was not even the jury's responsibility to decide whether McLain should receive a commutation, and that it would be a violation of its duties if it were to sentence McLain to death out of any fear connected with or related to the Governor's exercise of his commutation authority. Thus, if properly followed, this instruction would have led the jury to not consider the subject at all.

The Ninth Circuit nonetheless found this attention on the commutation process violated the Eighth Amendment because it diverted the jury's attention away from McLain's mitigation evidence. Hamilton v. Vasquez, 17 F.3d at 1162-63. In other words, the Ninth Circuit found it unlawful for the instructions to affirmatively structure the jury's discretion so as to focus some attention on these non-considerations. "However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." Buchanon v. Angelone, __ U.S. __, 118 S. Ct. 757, 761 (1998).

In other words, "diversion" is lawful under the Eighth Amendment so long as it does not amount to "preclusion." Indeed, this Court has already rejected the proposition that the basic California commutation instruction impermissibly "diverts" the jury's attention under any recognized interpretation of the Eighth Amendment. California v. Ramos, 463 U.S. at 1005-1008. The Court should grant certiorari in this case in order to do so again.

II.

THE WRIT SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE FOR THE FIRST TIME WHETHER A STATE CAPITAL DEFENDANT IS ENTITLED TO HAVE HIS JURY INFORMED OF LIMITATIONS ON THE POSSIBILITY OF HIS RELEASE ON PAROLE THROUGH COMMUTATION WHEN THE TRIAL JUDGE HAS PROHIBITED THE PROSECUTION FROM ARGUING THE EXISTENCE OF FUTURE DANGEROUSNESS AND INSTRUCTS THE JURY NOT TO BASE A DEATH SENTENCE ON THE DEFENDANT'S FUTURE DANGEROUSNESS

As explained in the preceding section with respect to the Eighth Amendment, this case has survived the State's highest court review under more stringent State constitutional law standards, but nonetheless has failed federal circuit court habeas review under the more lenient Federal Constitutional standards.

In 1981, a California trial judge correctly anticipated that the California Supreme Court would later hold as a matter of state law that a capital case jury should not consider as part of its penalty deliberations either the defendant's future dangerousness or the possibility that some future Governor might grant the defendant commutation of his life without parole prison sentence. This is what motivated the judge to preclude the prosecution from arguing the defendant's future dangerousness, to instruct the jury that it could not impose a death sentence on the basis of any future crimes he might commit or on the basis of his future criminal propensities, and finally, to instruct the jury not to consider whether some future Governor might commute his life without parole sentence, but instead to assume that the Governor would properly discharge his duties.

In a line of cases that begins with a plurality of this Court in Gardner v. Florida, 430 U.S. 349 (1977), and cumulates in this Court's decision in Simmons v. South Carolina, 512 U.S. 154

(1994), this Court has held that "[t]he Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" Simmons, at 161.

In the only two cases where this Court has actually applied this rule to invalidate a death sentence, Skipper v. South Carolina, 476 U.S. 1 (1986), and Simmons, the prosecutors in each of those cases argued the defendant's future dangerousness as a basis for imposition of the death penalty. In Skipper, the prosecutor specifically argued that the defendant was likely to be a disciplinary problem in prison and would likely rape other prisoners. Skipper, at 3, 5 n.1; id. at 9-11 (Powell, J. concurring).

In Simmons, the prosecutor specifically argued that the jury had to do something with the defendant "now that he is in our midst," and that the defendant presented a "threat" to society and that the jury's death verdict would "be an act of self-defense." Simmons, 512 U.S. at 157.

Here, the prosecutor never once argued that the jury should impose the death penalty because the defendant posed a risk of future dangerousness. To the contrary, the prosecutor admonished the jury at one point during his closing penalty phase argument that it could "not to base your decision on a prediction of what he would do in the future."

The above-described facts therefore bring before this Court the legal proposition contemplated by Justice O'Connor's concurring opinion in Simmons:

> [I]f the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without the possibility of parole.

Simmons, 512 U.S. at 176-77.

Now it is time to address Justice O'Connor's position.

It is true in this case that there was a great deal about McLain's past that suggested future dangerousness. McLain was a career criminal who had twice before served terms in state prison. The jury had evidence before it that McLain had been released on parole by California parole authorities and committed

multiple murder and rape, among other crimes, while on parole. McLain testified that, prior to his release on parole, he had told the parole board that he would "get revenge" against one of his child rape victims, Jodi W., and others by shooting them with a .44 rifle.

The jury also heard evidence that proved that McLain had accurately predicted in 1971 to Jodi W. that he would come back to kill her if she told anyone what he had done to her. The jury also heard evidence that McLain had made even more predictions of criminality. McLain predicted that his next escape attempt "would not be non-violent," that he would take a police officer with him before he would ever commit suicide, and that the next time he got out of prison, he would "not try to do right."

The existence of this evidence in this case, however, is also a reason for granting certiorari. Such facts would test the meaning of a rule of constitutional law that allows States to excise the issue of a defendant's future dangerousness from a jury's penalty determination here where the defendant's own words and deeds themselves suggest his future dangerousness.

The constitutional sovereign freedom of the States to prevent future dangerousness from entering capital sentencing decisions that Justice O'Connor envisions in her concurring opinion in Simmons would effectively be no freedom at all if it could not be exercised in a case where the defendant's own words and deeds suggested his future dangerousness.

Conversely, a case unlike this one would not be a good case to test the meaning of the rule. If Robert McLain was a remorseful first time offender whose capital crime could be considered aberrational conduct that was totally out of character for him, then the dual sovereignty "freedom" of the States to enforce a rule prohibiting consideration of his future dangerousness becomes nothing more than an admirable state gesture exercised purely in the abstract. The rule of law proposed by Justice O' Connor, if it is to have any real meaning, must be more than a paper tiger that cannot stand up to a rigorous set of facts.

Another reason to grant certiorari in this case is the fact that because the prosecutor never once used any of the above-described evidence to argue McLain's future dangerousness, and even admonished the jury that it could not base its decision on what McLain might do in the future, the resulting consistent theme of the prosecutor's argument to the jury focused the jury on the moral blameworthiness of McLain's words and deeds. The prosecutor argued consistently to the jury that McLain was the most immoral, vile, and reprehensible type of criminal one could imagine because he had led nothing but a life of crime and had done so without the slightest bit of conscience, remorse, or good character.

The Ninth Circuit nonetheless found in both Hamilton and here that the no-inference supplement to the commutation instruction actually "invited . . . predictions on what the Governor might do," and that "speculation was inevitable." Hamilton v. Vasquez, 17 F.3d at 1162. However, even a cursory examination of the no inference supplement reveals nothing on the face of the instruction that suggests that speculation was inevitable. This Court has rejected the proposition that an accurate no-inference instruction can cause the very harm it was intended to forestall. See, Lakeside v. Oregon, 435 U.S. 333 (1978) (the giving of an accurate cautionary instruction over the defendant's objection directing the jury not to draw any adverse inference from the defendant's decision not to testify does not violate the defendant's privilege against self-incrimination).

Limiting instructions are bedrock components of our adversary system, and any rule that concludes that limiting instructions cause the very harm they were intended to prevent impermissibly suggests "that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence." Barefoot v. Estelle, 463 U.S. at 901. Penalty phase evidence from a 41-year-old man who has spent his adult life in and out of prison, and who has just been convicted of murder, that he will "not try to do right" the next time he is released from prison might not be reliable evidence that he will kill anyone else if he gets out of

prison, but it certainly is pretty reliable evidence of his lack of remorse and bad moral character.

More to the point, if a jury is allowed to consider such evidence as it reflects on the defendant's character, background and mental state, but not as it reflects on the likelihood of the defendant committing future crimes, then the adversary process ***can*** be trusted to sort out the reliable from the unreliable.

Nonetheless, the Ninth Circuit's rule in Hamilton that was applied here also found that the cautionary supplement to the basic commutation instruction that advised the jury not to consider commutation and to assume the Governor would safely release the defendant back into society, by negative implication, suggested there was a risk the Governor might erroneously release the defendant back into society when he still posed a threat to public safety. Hamilton v. Vasquez, 17 F.3d at 1161.

However, the negative implication is true both as a matter of state law and as applied to the facts of this case. Under California law, it is possible through commutation for a Governor to erroneously release an inmate serving a sentence of life imprisonment without the possibility of parole. Indeed, this is the very reason why capital defendants in California have afforded to them the substantive state constitutional right not to have their sentencing juries impose the death penalty in an effort to second-guess and usurp any possibly erroneous commutation of a sentence of life imprisonment without the possibility of parole. People v. Ramos, 689 P.2d at 443.

This undeniably true fact draws attention to the caveat expressed in Simmons:

> In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we should not second-guess a decision whether or not to inform a jury of information regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide "greater protection in [the States']

> criminal justice system than the Federal Constitution requires."

Simmons v. South Carolina, 512 U.S. at 168.

In Simmons, this Court condemned a no-inference instruction concerning parole considerations where, by negative inference, the cautionary supplement was legally inaccurate, and the prosecution argued the defendant's future dangerousness. There, a cautionary instruction directing the jury not to consider "parole" as a sentencing consideration, by negative inference, suggested that parole was available, when, in fact, under South Carolina law, parole was not and never would be available to the defendant. In contrast, California law leaves open the speculative possibility of parole.

Because California law does not prohibit the possibility of parole for those sentenced to life imprisonment without the possibility of parole, including twice-convicted felons, it is legally accurate to say that a Governor could use his commutation power to effect an erroneous release of a defendant sentenced to life imprisonment without the possibility of parole even though additional concurrence by four of the seven justices of the state supreme court is necessary to effectuate the actual parole release.

As this Court recognized in Ramos, in California, "most jurors may have a general awareness of the availability of commutation and parole," and, as a result,

> the statutory description of one of the sentencing choices as "life without the possibility of parole" may generate the misleading impression that the Governor could not commute this sentence to one that included the possibility of parole.

California v. Ramos, 463 U.S. at 1004 n.3.

Thus, in this Court's view, California had the sovereign right to dispel that possible misunderstanding, and could even go so far as to rename this sentencing choice as "life imprisonment with the possibility of commutation." Id.

It follows from this that States have the sovereign right not only to dispel possible misunderstandings, but also "to flag jurors attention to concepts that must not be misunderstood."

Lakeside v. Oregon, 435 U.S. at 340. Here, that meant that the trial judge could flag the fact that McLain could have his sentence commuted and emphasize that the jury could not succumb to any temptation to usurp the Governor. This is particularly true in a case like this one, where the evidence suggested that McLain had already been once unjustifiably released on parole even after having told parole authorities he was going to kill Jodi W. and others associated with his prior rape and child molestation convictions.

It simply should not offend the Due Process Clause for a State to prevent a capital sentencing jury from engaging in "an exercise in speculation," Romano v. Oklahoma, 512 U.S. at 14, concerning the limited possibility of parole when the State excludes future dangerousness from the jury's consideration. The embodiment of that principle is presented by the facts of this case.

CONCLUSION

For the foregoing reasons, the warden respectfully requests that the Court grant the petition for writ of certiorari to the Ninth Circuit United States Court of Appeals decision in this case.

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Respectfully submitted,

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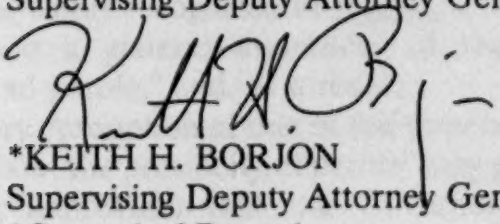

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